Supreme Court, U.S.
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Case No.: _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ALTON PLATT, LAUREN WRIGHT, CARLENE SMITH, KENNETH HURT and JIHAD MUHAMMAD, on their own behalf and on behalf of all others similarly situated.

Petitioners

v.

THE STATE OF INDIANA, EVAN BAYH, individually and in his capacity as Governor of Indiana, THE CONSOLIDATED CITY OF INDIANAPOLIS and COUNTY OF MARION, STEPHEN GOLDSMITH, individually and in his capacity as Mayor of the Consolidated City and County of Indianapolis and Marion, THE CITY-COUNTY COUNCIL OF THE CONSOLIDATED CITY OF INDIANAPOLIS AND COUNTY OF MARION, individually, and in their capacities as members of the City-County Council of the Consolidated City and County of Indianapolis and Marion, THE MUNICIPAL COURT OF MARION COUNTY, THE SUPERIOR COURT OF MARION COUNTY, THE MARION COUNTY PUBLIC DEFENDER AGENCY, and THE MARION COUNTY PUBLIC DEFENDER BOARD, Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Do the Petitioners, who are indigent Accuseds, state a civil cause of action to enforce, in a civil rights proceeding for injunctive relief prior to judgment in the criminal proceeding, their Sixth Amendment right to effective assistance of counsel in the preparation of their defense?

LIST OF ALL PARTIES TO THE PROCEEDINGS

The names of all the parties to the proceedings in the Supreme Court of Indiana are included in the caption. In compliance with Rule 29 it is noted that there are no parent companies or subsidiaries of any corporations involved in this matter.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

Petitioners Alton Platt, Lauren Wright, Carlene Smith, Kenneth Hurt and Jihad Muhammad respectfully seek a writ of certiorari to review the decision of the Indiana Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Indiana Court of Appeals is published in Platt v. State of Indiana, 664 N.E.2d 357 (Ind. App. 1996) and is reproduced in the Appendix beginning at page 1. The ruling granting the motion to dismiss the Third Amended Complaint by the Trial Court is reproduced in the Appendix beginning at page

BASIS FOR JURISDICTION

The petition for a writ of certiorari seeks review of the Indiana Court of Appeals decision and the decision of the Indiana Supreme Court to not accept transfer of the Petitioners' Petition to Transfer. The decision of the Indiana Supreme Court of 26 November 1996 to not accept transfer makes the Indiana Court of Appeals judgment final.

Jurisdiction is conferred upon the United States Supreme Court by 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Sixth Amendment to the United States Constitution states, in its pertinent part, that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Fifth Amendment to the United States Constitution, states, in its pertinent part, that:

> No person shall be . . . deprived of life, liberty, or property, without due process of law;

The Fourteenth Amendment to the United States Constitution, states, in its pertinent part, that:

> No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a class action brought under, among other statutes, 42 U.S.C. 1983 by Petitioner Alton Platt and other Petitioners. The suit alleged the following.

All petitioners are indigent persons accused of having

committed crimes and all have court appointed counsel. Mr. Platt was arrested on January 13, 1991 and charged with having committed felonies. He was unable to make bond. The Marion County (Indianapolis) Indiana Superior Court appointed counsel to represent him on January 15, 1991. On that date Platt met his appointed counsel for the first time. They communicated for less than sixty (60) seconds. Over the next nine (9) months Platt had three (3) communications with counsel. Each lasted less than sixty (60) seconds. Counsel refused to accept Platt's collect phone calls from jail, did not answer his letters and never visited him in jail prior to the filing of the complaint in this suit. Counsel did not discuss the case with Platt and did not interview any potential witnesses or prepare any possible defenses to the charge. There was no investigation and no pretrial motions. No effective defense was prepared. The other named plaintiffs were all charged with felonies either in Superior Court or Municipal Court and had similar experiences with their appointed counsel.

In Marion County more than eighty percent (80%) of all persons charged with crimes in the Criminal Court; more than

10,000 persons charged with crimes in the Marion County Municipal Court (which handles lesser felonies and misdemeanors); and, more than 2,500 juveniles charged in the Juvenile Division have counsel appointed for their defense. Counsel representing indigent accuseds do not satisfy the minimum constitutional obligations of providing adequate defense to indigent criminal defendants and juveniles. Each Judge hires private attorneys to provide legal representation for indigent accuseds. They are paid out of the Court's budget. The decision on whether to hire a particular attorney as a public defender is based upon that attorney's personal, or partisan, relationship with the judge. Counsel is hired on a political party basis. They receive clients on a rotating basis. There is no upper limit on the number of cases. Compensation does not vary with the number of cases assigned, or amount of time and effort expended. Counsel are "part-time" and have private civil and criminal law practices which compete for their time and attention. There are no paid staff investigators, secretaries, or paralegals. Counsel fees are inadequate, and along with the lack of defense services, prevent effective representation to indigent defendants.

Counsel have insufficient time to consult with their clients. The relationship between the Judges and counsel is one of employer-employee and creates both an appearance and an actual conflict of interest in that appointed counsel must vigorously represent their clients in front of the same person who can fire them. There is a direct and immediate disincentive to do anything that would displease a Judge. The Municipal Court Presiding Judge hires and fires the "Chief Public Defenders" and their Deputies and has engaged in partisan politically-based patronage hiring and firing practices for attorneys and staff.

The Petitioners alleged in their complaints that there was intentional underfunding of indigent defense to the extent that an adequate assistance of counsel, prior to conviction, was not provided. The cumulative effect of the inadequacies in the provision of indigent criminal defense in Marion County constitutes a systemic failure to satisfy minimum constitutional standards of the Fifth, Sixth and Fourteenth Amendments.

The Petitioners further alleged a gross disparity between the resources for the prosecution of, as compared to the defense, of

indigent accuseds which precludes a fair trial. The present condition of the indigent defense system has existed for more than twenty (20) years and has been studied and reported upon at least six (6) times since 1976. Each of the studies was referred to in the complaint and the studies findings formed part of the factual allegations of systemic ineffective assistance of counsel and the need for prevention.

Those reports are: 1) An Analysis of Indigent Defense Services In Marion County (Indianapolis) Indiana; ("1976 Report"); 2) Report No. 80-8, The Public Defender System of Marion County, Indiana: Current and Projected Costs; ("1980 Report"); 3) Report to Marion County Municipal Court Nominating Commission, RE: Municipal Court Public Defender Office; Evaluation of Partial State Funding for Public Defender Services in Indiana ("1985 Report"); 4) 1986 Statewide Study of Public Defender Services ("1986 Report"); 5) Marion County (IN) Municipal Court Public Defender and Probation Departments: First Report of Court Management Review Phase II ("1989 Report"); and, 6) Report of the Commission on Public Defenders of the

Indianapolis Bar Association ("1991 Report").

The 1976 Report revealed that the 1976 public defender system was, in all significant details, the same as it was at the time this action was filed. The 1980 Report found that the "Marion County system [fell] short of most of the ABA standards" relating to providing criminal defense services." Appointed counsel lacked professional independence; support services and training; adequate funding; and had a politics-ridden selection of chief defender and staff process. The 1985 Report noted that there was a lack of continuity of counsel; a lack of independence from the judiciary; a failure to interview clients prior to trial; inadequate preparation of cases for trial; insufficient supervision, training and support services; and inadequate funding. The 1986 Report concluded there was a lack of public defender independence from the judiciary; a lack of support services and money for investigation and experts; and, a lack of controls on the caseloads of individuals. The 1989 Report noted that the Municipal Court Public Defender office lacked most of the characteristics of an effective organization; in "most instances the public defender will not see a defendant's file after the first trial

hearing until a few minutes before the rescheduled trial date"; that "many . . . clients become lost in the system unless they contacted the public defender's office by collect call"; and that most appointed counsel left an "impression of apathy, and not infrequently antipathy to defendants." The 1991 Report by the Indianapolis Bar Association "arrived at a unanimous conclusion that the present fragmented system of delivery of public defender services to the indigent in Marion County is seriously deficient"; "the caseloads of public defenders clearly indicate that indigent defense services are seriously underfunded"; and, that "public defenders presently handle two-to-three times the number of cases recommended in national standards for public defender caseloads."

Trial Court

On April 10, 1992 the Petitioners filed a Class Action complaint. The Petitioners filed a Second Amended Complaint on September 2, 1993 which alleged all of the allegations contained in the "Statement of the Case Portion" of this Petition for Certiorari. The Petitioners alleged systematic violations of their Sixth Amendment right to effective assistance of counsel; Fifth

Amendment Due Process of law; and their Fourteenth Amendment right to equal protection of the law in their complaint. Petitioners filed a Motion for Partial Summary Judgment which included the reports noted above. The Defendants move to Dismiss the Second Amended Complaint for failure to state a claim upon which relief could be granted. The Trial Court entered an order granting the Motions to Dismiss for failure to state a cause of action.

Indiana Court of Appeals

On 16 April 1996 the Indiana Court of Appeals, Fifth District, upheld the Trial Court's dismissal, holding that under no set of facts could Petitioners be granted relief. The Court of Appeals held that "a violation of a Sixth Amendment right will arise only after a defendant has shown he was prejudiced by an unfair trial" (App. 6) that the Petitioners' claims were "not reviewable under the Sixth Amendment." (App. 6).

Indiana Supreme Court

On 26 November 1996, in a one sentence opinion, the Indiana Supreme Court denied transfer. Thus affirming the Court of Appeals decision. This petition for certiorari is being filed less than

ninety (90) days after that ruling. (S.C. Rule 13(1)) The 90th day is 25 February 1997.

REASONS FOR GRANTING THE WRIT

1. A state court of last resort has decided an important federal question in a way that conflicts with the decision of a United States Court of Appeal (S.C. Rule 10(b))

The core federal constitutional claim in this litigation is the Sixth, Fifth, and Fourteenth Amendment rights of indigent accused to effective assistance of counsel prior to conviction and avoid being subjected to an unfair trial and conviction and then establish, post-conviction, that appointed counsel had not played "the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 685, 104 S.Ct 2052 (1988).

The right to counsel is "one of the safeguards deemed necessary to insure fundamental rights of life and liberty." Johnson v. Zerbst, 304 U.S. 458, 82 L Ed 1461, 58 S.Ct. 1019, (1937), at 462. It is the right to effective counsel. Mann v. Richardson, 397 U.S. 759, 25 L.Ed.2d 763, 90 S.Ct. 1441 (1970); Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct 792 (1963).

Strickland created "factual presumption" for accuseds claiming ineffective assistance of counsel to overcome in order to obtain a reversal of a conviction. Preventing, rather than remedying, ineffective assistance of counsel is an important federal question because of the loss of significant lost during the period of time after conviction and before reversal. Additionally a justice system must be seen to be fair for it to have the public's confidence..

The symptoms indicate systemic failure and have been noted to previously exist in Marion County Indiana. Smith v. State, 511 N.E.2d 1042 (1987) ("The reversal of this conviction may not have come about so much from an individual performance as from a flaw in the system maintained to provide legal counsel to those unable to meet the expense on their own."); Dubinion v. State, 600 N.E.2d 136, 138 (Ind. App. 1992) ("case vividly demonstrates the need for a dramatic and substantial revision of the Marion County Municipal Court system including most prominently the Municipal Court Public Defender system.") The trial court noted how widespread the crisis in indigent defense is nationwide. The Trial Court held in its July 8, 1994 entry at fn 2, that:

The inadequacy of the public defender system in Marion County, as alleged in the Complaint, is not a problem unique to Marion County

Before reversing a conviction under Strickland a court must be convinced that:

1) a deficient performance by counsel;
2) caused a sufficiently great prejudice to the defendant. Strickland at 694.

The Petitioners have an important federal right to prevent ineffective assistance of counsel before conviction because in addition to the above there is a strong presumption that trial counsel was adequate, that any errors which were made were conscious ones, and that the trial counsel's conduct was constitutionally adequate. Strickland at 690-91. The current standard is to determine, after conviction, whether there was constitutionally deficient ineffective assistance of counsel.

Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988), cert. den. 495 U.S. 957, 110 S.Ct. 2562 (1990) later Luckey v. Miller, 976 F. 2d 673 (11th Cir. 1992) recognized a civil cause of action to prevent ineffective assistance of counsel. Similarly Wallace v. Kern, 392 F.

Supp. 834 (E.D.N.Y 1972) rev'd on abstention grounds, 482 F.2d 621 (2d Cir. 1973) found that preconviction claims of ineffective assistance of counsel could be addressed on a class-action basis prior to conviction.

The Indiana Court of Appeals erroneously construed Strickland as meaning there is no civil right to prevent a Strickland violation from inevitably occurring.

Hence the Platt opinion directly conflicts with Luckey and Wallace.

2. A state court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court (S.C. Rule 10(c))

The Constitution's guarantee of effective assistance of counsel to indigent accuseds cannot be satisfied by a mere formal appointment. Avery v. Alabama, 308 U.S. 444, 446, (1940). Kimmelman v. Morrison, 477 U.S. 365, (1986). "The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary system." Id. at

374, and is the "right to effective assistance of counsel." Ibid. at 377. The "right to effective assistance of counsel is personal to the defendant, and is explicitly tied to a fundamentally fair trial - a trial in which the determination of guilt or innocence is "just" and "reliable." Ibid. (J. Powell, concurring) at 392-393.

When effective assistance of counsel is not provided the entire adversary system itself to suffers. McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974). Inadequate representation is "not a product of an adversary [process], but a flaw in the adversary process." Ibid. at 218-19.

The crisis in providing adequate assistance of counsel, prior to conviction, is not restricted to Marion County but is a nationwide problem of long standing and it is worsening. Piecemeal after the fact remedy of reversing convictions is ineffective when the problem is the system. See State v. Peart, 621 So.2d 780 (La. 1993); The Crisis In Indigent Criminal Defense, 44 Ark. L.R. 235 (1991); A Noble Ideal Whose Time Has Come, 18 Memphis State U. L.R. 223. (1991); [Un]Luckey v. Miller: The Case for A Structural Injunction to Improve Indigent Defense Services, 101 Yale L. J.

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This important federal question of preconviction of effective assistance of counsel gathers heightened importance in light of the restrictions on habeas corpus enacted recently.

The Courts, since the governmental officials involved are officers of the court and the harm effects the judicial system are uniquely qualified to act and not defer to the executive or legislative branches for a remedy.

As Chief Justice Burger noted surely "an effective system of justice is as important to the social, economic and political health of the country as an adequate system of medical care is to our physical health." C.J. Burger, Has the Time Come?, 55 F.R.D. 119, 123 (1972).

CONCLUSION

WHEREFORE, Petitioners request this court to grant their petition for certiorari to the Indiana Court of Appeals and for all other proper relief.

Respectfully Submitted this 21 February 1997.

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